



May 18, 2014

Submitted Electronically, Please Confirm Receipt

Regional Freedom of Information Officer
U.S. EPA, Region 2
290 Broadway, 26th Floor
New York, NY 10007-1866
(212) 637-3668
r2foia@epa.gov

Re: Freedom of Information Act Request for Energy Answers' Construction Updates.

Dear Regional Freedom of Information Officer:

On behalf of Amigos del Río Guaynabo, Inc., Ciudadanos en Defensa del Ambiente, Comité Basura Cero Arecibo, Madres de Negro de Arecibo, and Sierra Club de Puerto Rico (collectively "Public Interest Groups"), Earthjustice submits this request for information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the U.S. Environmental Protection Agency ("EPA") FOIA regulations set forth in 40 C.F.R. Part 2. This request seeks the production of the monthly updates submitted by Energy Answers Arecibo, LLC ("Energy Answers") to EPA regarding its progress towards commencing construction of its proposed municipal solid waste incinerator in Arecibo, Puerto Rico.

The Public Interest Groups request a fee waiver for this FOIA request.

I. BACKGROUND

Energy Answers is proposing to construct a municipal solid waste incinerator in Arecibo, Puerto Rico. EPA Region 2 issued a Prevention of Significant Deterioration ("PSD") permit for the facility on April 10, 2014, that was extended on October 1, 2015, and again on April 10, 2017. In the April 10, 2017 letter granting the second extension, EPA Region 2 ordered Energy Answers to provide monthly construction updates. *See* Attachment 1. On May 10, 2017, the Public Interest Groups requested that EPA share copies of Energy Answers' monthly construction updates with the Public Interest Groups in light of the significant community and individual interests that will be harmed as a result of the project. *See* Attachment 2.

On May 16, 2017, Earthjustice received a phone call from Viorica Petriman at EPA Region 2 indicating that EPA decided to handle the Public Interest Groups' request through the FOIA process. Ms. Petriman instructed the Public Interest Groups to submit one FOIA request for the monthly construction updates, and EPA would make available to the Public Interest Groups construction updates submitted prior to the request and all updates submitted after the request.

II. REQUEST

For purposes of this request, the term “record” means information of any kind, including, but not limited to, documents (handwritten, typed, electronic, or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

The Public Interest Groups seek:

1. All records pertaining to Energy Answers’ updates of its progress towards commencing construction of the proposed incinerator in Arecibo, Puerto Rico. These records include, but are not limited to, Energy Answers’ monthly construction updates to EPA; any attachments thereto; and any emails, letters, or other records related to EPA’s review of these construction updates.

This request seeks both all such records from April 10, 2017 to the date that EPA acknowledges this request, and all such records subsequent to the date that EPA acknowledges the request.

In addition, the Public Interest Groups request written confirmation from EPA that no additional FOIA requests are necessary in order to produce responsive records subsequent to the date that EPA acknowledges this request.

III. RECORD DELIVERY

To save resources and mailing expense, we request electronic copies of these documents, if available. If EPA chooses not to disclose any of the requested records, we request that EPA: 1) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied); 2) explain in full the basis on which nondisclosure is sought; and 3) provide us with any segregable portions of the records for which it does not claim a specific exemption.

We anticipate a reply within twenty working days. *See* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a). We appreciate your expeditious help in obtaining the requested information. Failure to comply within the statutory timeframe may result in the Earthjustice taking additional steps to ensure timely receipt of the requested materials. Please promptly email or mail copies of all requested records to:

Jonathan Smith
Associate Attorney
Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005
jjsmith@earthjustice.org

If you find that this request is unclear or if the responsive records are voluminous please contact me at (212) 845-7379 to discuss the proper scope of this request.

IV. FEE WAIVER REQUEST

Fee waivers are appropriate when “disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(1). EPA examines four factors when considering whether a request contributes to public understanding: 1) the subject of the request; 2) the informative value of the information being disclosed; 3) the contribution to an understanding of the subject by the public is likely to result from disclosure; and 4) the significance of the contribution to public understanding. *Id.* § 2.107(l)(2). Additionally, to determine whether the request “is not primarily in the commercial interest of the requester” the government will consider two factors: 1) The existence and magnitude of a commercial interest and 2) the primary interest in disclosure. *Id.* § 2.107(l)(3).

A. The Request is in the Public Interest.

1. The request seeks information that has a direct and clear connection to EPA operations or activities.

The Public Interest Groups’ request meets all four factors under the first requirement. First, the subject of the request “concern[s] identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.” 40 C.F.R. § 2.107(l)(2)(i). This request seeks information directly related to EPA’s decision to grant a second extension to Energy Answer’s PSD permit and the basis for that decision, namely, Energy Answers’ representations about its progress towards commencing construction. The connection is “direct and clear” because EPA possesses the statutory authority to regulate PSD permits pursuant to 42 U.S.C. §7475. EPA regulations allow the agency to extend PSD permits upon a proper showing pursuant to 40 C.F.R. § 52.21(r)(2). In addition, EPA specifically requested from Energy Answers the construction updates that the Public Interest Groups seek. *See* Attachment 1.

2. Disclosure of the requested information is likely to contribute to an understanding of government operations or activities.

EPA next considers whether disclosure of the requested records is “likely to contribute” to an “understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii). To satisfy this requirement, the disclosable records must be “meaningfully informative about government operations or activities.” *Id.* Information not “already . . . in the public domain” is considered more likely to contribute to an understanding of government operations or activities. *Id.* Here, the Public Interest Groups request information that will provide both the Public Interest Groups and the general public with a better understanding of Energy Answers’ progress towards

construction, a central consideration in EPA's decision to extend the PSD permit. That information is not already in the public domain.

3. The requested information will contribute to public understanding.

EPA also considers whether the requested information will contribute to "public understanding" of the subject. 40 C.F.R. § 2.107(l)(2)(iii). Disclosure "must contribute to the understanding of a reasonably broad audience." *Id.* EPA will consider whether the requestor has "expertise in the subject are and [an] ability and intention to effectively convey information to the public." *Id.* Here, there is widespread interest in the future of the Energy Answers facility. For example, more than 3,800 people submitted comments on draft environmental impact statement for the facility issued by the Rural Utilities Service of the U.S. Department of Agriculture.¹ Most, if not all, of these individuals and groups will be interested in learning about Energy Answers' progress towards construction. The Public Interest Groups intend to disseminate information obtained through this FOIA request broadly through means such as newsletters, websites, social media, and press releases. Further, the Public Interest Groups have developed significant expertise in environmental and public health advocacy that range from litigating the legality of the PSD permit to submitting extensive comments on the draft environmental impact statement referenced above.

4. Disclosure of the requested information will make a significant contribution to the public's understanding.

The fourth factor EPA considers is whether the records are "likely to contribute 'significantly' to public understanding of government operations or activities." 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (the relevant test is whether public understanding will be increased after disclosure, compared to the public's understanding prior to the disclosure). Where information is not currently available to the general public, and where "dissemination of information . . . will enhance the public's understanding," the fourth public interest factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205. Here, the request satisfies the fourth factor because Energy Answer's construction updates are not currently available to the general public, and dissemination of this information will significantly enhance the public's understanding of Energy Answers' progress.

B. A Fee Waiver Is Also Proper Because the Public Interest Groups Have No Commercial Interest in Disclosure of the Requested Information.

This request is not in the commercial interest of the requester. To satisfy this prong, EPA will consider two factors. First, EPA will consider the "existence and magnitude of a commercial

¹ U.S. Department of Agriculture, Rural Utilities Service, Final Environmental Impact Statement, Arecibo Waste-to-Energy and Resource Recovery Project C-2 (Jan. 2017), https://www.rd.usda.gov/files/UWP-Arecibo_WTE_FEIS.pdf.

interest,” and second, EPA will consider “the primary interest in disclosure.” 40 C.F.R. § 2.107(l)(3). Here, the Public Interest Groups are non-profits or local grassroots organizations dedicated to the protection and enjoyment of the environment. Sierra Club de Puerto Rico, Ciudadanos en Defensa del Ambiente, and Comité Basura Cero Arecibo are all 501(c)(3) nonprofit organizations. The organizations exist solely to advocate for the protection and enjoyment of the environment and do not seek commercial benefit. Given the non-profit nature of the Public Interest Groups, their limited financial resources, and all of the foregoing reasons, a fee waiver is warranted. *See* 5 U.S.C. § 552(a)(4)(A)(iii).

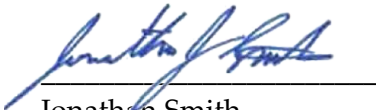
* * *

For the foregoing reasons, we urge EPA to waive all fees associated with this request. In the event that you do not grant the requested waiver, however, please provide us with specific information concerning the basis for such a decision, as required by FOIA. Please note that our request for a fee waiver should not be construed as an extension of time in which to reply to this FOIA request. Please send information on a rolling basis as it becomes available. In the event that the FOIA officer denies a fee waiver, please contact us at (212) 845-7379 to discuss fees.

V. CONCLUSION

If you have any questions, please do not hesitate to contact me at (212) 845-7379 or jjsmith@earthjustice.org. Thank you in advance for your prompt reply.

Sincerely,



Jonathan Smith
Associate Attorney
Earthjustice

CC:

Viorica Petriman
Air Permitting Section
EPA Region 2
petriman.viorica@epa.gov

Attachment 1



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

290 BROADWAY

NEW YORK, NY 10007-1866

APR 10 2017

Mr. Mark J. Green
Vice President
Energy Answers Arecibo, LLC
The Atrium Business Center, Suite 229
530 Constitution Avenue
San Juan, Puerto Rico 00901-2304

Re: Prevention of Significant Deterioration (PSD) of Air Quality
Request for a PSD Permit Extension for the Energy Answers Arecibo Puerto Rico
Renewable Energy Project

Dear Mr. Green:

We are in receipt of your March 21, 2017, letter requesting a five-month extension, to September 10, 2017, of the final Prevention of Significant Deterioration (PSD) permit for the proposed Energy Answers Arecibo, LLC (Energy Answers) facility. We have reviewed the information you provided and decided to grant your request for a limited five-month extension.

Background

EPA Region 2 issued a final and effective PSD permit to Energy Answers on April 10, 2014. Pursuant to 40 CFR §52.21(r)(2), the PSD permit would have expired on October 10, 2015 if Energy Answers neither commenced construction nor received a permit extension from EPA. After receiving Energy Answers' timely request for a permit extension, EPA Region 2 granted an 18-month extension of the PSD permit on October 1, 2015 which will expire on April 10, 2017. Energy Answers' March 21, 2017 letter requests an additional five months, until September 10, 2017, to commence construction.

Discussion

In your letter, you explain that Energy Answers' ability to commence construction has been constrained by the Environmental Impact Statement (EIS) review on a federal loan for the facility being conducted by the USDA Rural Utilities Service (RUS) pursuant to the National Environmental Policy Act (NEPA). In particular, you indicate that if Energy Answers commences on-site construction beyond very limited site activities prior to issuance of the RUS Record of Decision (ROD), the project could become ineligible for the RUS loan. We confirmed with the RUS today that your financing would indeed be jeopardized if Energy Answers starts construction before the ROD is issued. Your letter also states that the NEPA onsite construction restriction has delayed issuance of the previously approved Conditional Letter of Map Revision (CLOMR) from FEMA and, in turn, the Puerto Rico Planning Board Siting Consultation. Therefore, it appears that finishing the RUS process is critical to completing several steps that prevent the project from commencing construction.

Your letter indicates that issuance of the RUS ROD will take place within a matter of days to a few weeks of the April 10, 2017 PSD permit deadline for commencing construction, and then Energy Answers will be able to quickly embark on the remaining actions that must be taken before construction can commence. The timeline provided in your letter reflects that, over the next five months, there will be continued progress toward commencing construction and that the remaining milestones represent the final stages of a lengthy NEPA review process that has, to date, spanned 28 months. In addition, your timeline further indicates that Energy Answers will soon begin limited test pile/foundation work and enter into an Engineering Procurement and Construction (EPC) contract.

EPA's PSD regulation at 40 CFR §52.21 states that EPA may allow a permit extension "upon a satisfactory showing that an extension is justified." As reflected in EPA's Memorandum dated January 31, 2014, titled "Guidance on Extension of Prevention of Significant Deterioration (PSD) Permits under 40 CFR §52.21(r)(2)" (Extension Memorandum), the PSD regulation "does not specify that any particular criteria must be satisfied" and therefore EPA maintains discretion to make PSD permit extension decisions on a case-by-case basis.

There are a number of factors that lead us to conclude that a five-month extension is justified. These factors include the above-referenced delays in Energy Answers' ability to construct due to the RUS process and your representations regarding the imminent issuance of the RUS ROD, execution of the EPC contract and limited test pile/foundation work. In addition, the specific milestones you have provided represent continued steady progress toward commencing construction (including EPC contract execution, FEMA on-site work and test piles, and RUS ROD issuance, FEMA CLOMR issuance, RUS loan commitment letter issuance, fill and foundation work, and notification to EPA of construction start) and your representation that there will be a relatively short time-span before your planned commence construction date.

EPA has discretion to decide whether, and under what terms, to grant or deny a permit extension. One of the terms that EPA must decide is whether or not to require a substantive re-analysis of the PSD permit requirements. As explained in EPA's October 1, 2015 letter granting your previous request for an 18-month extension, EPA's Extension Memorandum notes that it is "significantly more likely that technology and air quality considerations will become outdated when construction does not begin until 36 months or longer" after PSD permit issuance. While the Extension Memorandum states that, "in most cases a request for a second extension of the commencement of construction deadline should include a substantive re-analysis" of the PSD permit requirements, the Memorandum contemplates situations when a re-analysis might not be required. In light of the specific circumstances presented by your current extension request for an abbreviated 5-month extension, as described above, EPA Region 2 has decided not to require re-analysis at this time.

In addition to considering the information in Energy Answers' March 21 letter, EPA Region 2 did an independent review of whether there have been any new developments in control technology by checking both the RACT/ BACT/LAER Clearinghouse and the latest Energy Recovery Council Directory of Waste to Energy Facilities. We also surveyed state permitting websites and other sources to see if new control technologies have been utilized for similar waste to energy facilities in the United States. Based on this limited review, we are not aware of any

examples of more stringent emission limits or new control technologies with respect to the municipal waste combustors and the ancillary equipment that have been permitted since Energy Answers' final effective permit was issued. We are also not aware of any construction or modification of major sources of emissions in the project area since issuance of Energy Answers' PSD permit and therefore have no reason to believe that the conclusions made on the air quality impact analysis at the time of permitting are not still valid.

EPA also took into consideration that a new National Ambient Air Quality Standard (NAAQS) for ozone was promulgated in 2015 after the final and effective PSD permit was issued to Energy Answers. We note that the existing ambient ozone concentrations in Puerto Rico are well below the NAAQS (as has historically been the case in Puerto Rico) and that the additional ozone precursor emissions from the proposed Energy Answers facility are low in comparison to recent studies performed by EPA on ozone precursors (as well as precursors to secondarily formed PM_{2.5} [see December 2, 2016 draft guidance link at https://www3.epa.gov/ttn/scram/guidance/guide/EPA-454_R-16-006.pdf]). Therefore, we have no reason to expect any concerns from this facility related to the new NAAQS. In addition, EPA notes that the Guideline on Air Quality Models (40 CFR Part 51 Appendix W) was revised and published by EPA on January 17, 2017 (but is not yet effective) and that there have been updates to the AERMOD modeling system. These revisions and updates serve largely to enhance and refine model predictions. We have no reason to believe that these revisions would change the conclusions made at the time of permit issuance that the NAAQS and increments continue to be protected.

Given the abbreviated five-month extension requested by Energy Answers, combined with all the factors discussed above and no apparent changes to the BACT and air quality analyses, EPA has concluded that BACT re-analysis is not required. This conclusion is consistent with the Extension Memorandum's recognition of the "delay or significant resource burden that may result from substantive re-analysis in the context of even a relatively brief extension request." When Region 2 issued the October 1, 2015 extension letter, we indicated that we would not be inclined to grant another 18-month extension without a re-analysis. However, given the relatively brief extension requested by Energy Answers, the time and resource burden of conducting a re-analysis combined with the other factors discussed above and the discretion afforded EPA, an abbreviated extension without re-analysis is justified.

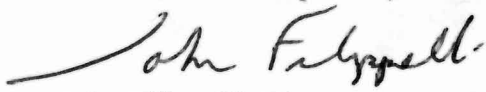
The Extension Memorandum states that when a substantive re-analysis is not conducted, "the EPA does not see the ... basis for providing an opportunity for public comment on the extension." The Memorandum encourages the permitting authority, however, to notify the public once it has issued the permit extension, particularly where there has been significant public interest in the permit. In light of the public interest in the Energy Answers PSD permit, we will post this decision to extend the commence construction deadline on Region 2's website and provide notice of this decision in a local newspaper.

In conclusion, EPA Region 2 is exercising its discretion to grant an abbreviated five-month extension of Energy Answers' Clean Air Act PSD permit, until September 10, 2017. Please note that this action does not alter the substantive PSD permit conditions found in Enclosure I and the Enclosure II-General Permit Conditions which were included with the April 10, 2014 PSD

permit. Given the tight schedule for the project over the next five months, we ask that you provide us with monthly updates of your progress toward commencing construction.

If you have any questions regarding this letter, please call me at (212) 637-3736 or Suilin Chan, Chief, Permitting Section, Air Programs Branch, at (212) 637-4019.

Sincerely,

A handwritten signature in black ink, appearing to read "John Filippelli". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

John Filippelli, Director
Clean Air and Sustainability Division

Attachment 2

**AMIGOS DEL RÍO GUAYNABO, INC.
CAMBIO
CIUDADANOS EN DEFENSA DEL AMBIENTE
COMITÉ BASURA CERO ARECIBO
MADRES DE NEGRO DE ARECIBO
SIERRA CLUB DE PUERTO RICO**

May 10, 2017

Mr. John Filippelli, Director
USEPA Region 2
Clean Air and Sustainability Division
290 Broadway
New York, NY 10007-1866
Filippelli.John@epa.gov

Re: Energy Answers Arecibo, LLC's Progress Toward Commencing Construction

Dear Director Filippelli:

We are writing on behalf of the organizations listed above to both (1) inform you of already-missed milestones related to the progress of Energy Answers Arecibo, LLC ("Energy Answers") towards commencing construction of its proposed municipal solid waste incinerator in Arecibo, Puerto Rico; and (2) request copies of the monthly updates provided to EPA by Energy Answers concerning its progress towards commencing construction of this facility.

In an April 10, 2017 letter ("EPA Letter"), EPA granted Energy Answers' request for a second extension, until September 10, 2017, of the Prevention of Significant Deterioration ("PSD") permit for the Arecibo facility. EPA granted this request based on representations that the company would move toward commencing construction on a "tight schedule" over the ensuing five months. EPA Letter at 4. Specifically, the EPA Letter listed certain factors which led EPA Region 2 to conclude that a second extension of the PSD permit was justified. These factors include:

delays in Energy Answers' ability to construct due to the RUS [Rural Utilities Service] process and [Energy Answers'] representations regarding the imminent issuance of the RUS ROD [Record of Decision], execution of the EPC contract and limited test pile/foundation work. In addition, the specific milestones [Energy Answers] ha[s] provided represent continued steady progress toward commencing construction (including EPC contract execution, FEMA on-site work and test piles, and RUS ROD issuance, FEMA CLOMR issuance, RUS loan commitment letter issuance, fill and foundation work, and notification to EPA of construction start) and [Energy Answers'] representation that there will be a relatively short time-span before your planned commence construction date.

EPA Letter at 2.

But just one month since EPA's granting of the extension, Energy Answers has already fallen behind its stated schedule. For example, Energy Answers' March 21, 2017 request for a second extension ("Energy Answers Request") indicated that the RUS ROD would issue by April 28, 2017. Energy Answers Request at 3. EPA Region 2 granted the five-month extension in reliance on this misrepresentation of "the imminent issuance of the RUS ROD." EPA Letter at 2. As of the date of this letter, RUS has yet to issue its ROD. Accordingly, Energy Answers' proposed timeline towards construction has already been delayed by at least 12 days. As the EPA Letter notes, until the ROD is issued, Energy Answers cannot embark on a number of actions that must be taken before construction can commence.

In addition, the Energy Answers Request represented that the company would commence "Phase I work," including "FEMA Onsite work and test piles" by April 7, 2017. Energy Answers Request at 3. While Energy Answers applied to the Puerto Rico Permits Management Office ("PRPMO") for a permit that would allow it to conduct test piles onsite (docket 2017-157223-PCU-002699), the company did not submit necessary application documents to the PRPMO. As a result, on May 8, 2017, the PRPMO archived the permit application due to Energy Answers' failure to complete the application process. Despite not having a permit to conduct such test piles and in violation of the conditions specified in the clearing and grubbing permit granted by the PRPMO (2017-157223-PCT-001538), Energy Answers drove one test pile during the week of April 10, 2017. Energy Answers stopped the work that same week as several complaints were filed by local community members with the PRPMO denouncing Energy Answers' unpermitted activities. We are not aware of any additional testing of piles in the three weeks since that initial test.

As the facts show, Energy Answers is failing to adhere to the "tight schedule" towards commencing construction it promised to EPA when it requested and received a second extension of its PSD permit. This inability to meet deadlines should come as no surprise. It is reflective of Energy Answers' history with its failed incinerator proposal in Baltimore, Maryland, and it is characteristic of the Arecibo project, which has limped along in the face of intense public opposition since the project's inception more than a decade ago.

EPA requested monthly updates from Energy Answers of its progress toward commencing construction. EPA Letter at 4. In light of the significant community and individual interests that will be harmed as a result of this project, we request that you share with us a copy of any such construction update that you receive concerning the proposed Energy Answers facility.

Sincerely,

Jonathan Smith
Hannah Chang
Earthjustice
jjsmith@earthjustice.org
212-845-7379

Kenneth Rumelt
Vermont Law School
Envtl. & Natural Res. Law Clinic
krumelt@vermontlaw.edu
802-831-1031

Pedro Saade Llorens
University of Puerto Rico
School of Law Environmental
Law Clinic
pedrosaade5@gmail.com
787-999-9573

cc: Hon. Luis V. Gutiérrez (via email)
Member of Congress

Ariel Iglesias, Deputy Director (via email)
Clean Air and Sustainability Division
U.S. EPA Region 2

Carmen Guerrero, Director (via email)
Caribbean Environmental Protection Division
U.S. EPA Region 2